

No. 15-222

In the Supreme Court of the United States

LARRY WAYNE BARNES, SR., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should summarily vacate the decision below and remand for further proceedings in light of *United States v. Wong*, 135 S. Ct. 1625 (2015), where the court of appeals held that petitioners would not be entitled to equitable tolling because they were not diligent and no exceptional circumstances excused their failure to timely file suit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-38) is reported at 776 F.3d 1134. The order of the district court (Pet. App. 39-50) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 2015. A petition for rehearing was denied on March 17, 2015 (Pet. App. 51). On June 22, 2015, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including August 14, 2015, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On May 20, 2010, petitioners filed administrative claims with the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) under the Federal Tort Claims

Act (FTCA), 28 U.S.C. 2671 *et seq.*, asserting claims of negligence and intentional infliction of emotional distress in connection with petitioner Larry Barnes's prosecution and imprisonment for narcotics crimes. Pet. App. 3-4. About one year later, while the administrative claims remained pending, petitioners filed a civil action in Oklahoma state court asserting tort claims against ATF and various state and individual defendants. *Id.* at 4. ATF removed the claims against it to the United States District Court for the Northern District of Oklahoma pursuant to 28 U.S.C. 1442(a)(1), and petitioners subsequently amended their complaint to add the United States as a defendant. Pet. App. 4-5 & n.2. The government then filed a motion to dismiss for lack of subject matter jurisdiction. *Id.* at 4. The government argued that federal removal jurisdiction is derivative of the originating state court's jurisdiction and that the Oklahoma state court had lacked subject matter jurisdiction over petitioners' suit because the FTCA provides the exclusive remedy for tort claims against the United States and vests exclusive jurisdiction over those claims in the federal district courts. *Ibid.*; see 28 U.S.C. 1346(b).

On October 25, 2011, before any ruling on the government's motion to dismiss that case, ATF denied petitioners' administrative tort claims. Pet. App. 5. The notice of denial expressly informed petitioners that any lawsuit challenging the denial "must be filed in an appropriate United States district court not later than six months after the date of the mailing of this notification"—that is, by April 25, 2012. *Id.* at 5-6 (quoting notice of denial; court's emphasis omitted); see 28 U.S.C. 2401(b) (providing that "[a] tort claim against the United States shall be forever barred

* * * unless action is begun within six months after the date of mailing * * * of notice of final denial of the claim by the agency to which it was presented”).

On March 23, 2012, the district court in the case that had been removed from Oklahoma state court granted the motion to dismiss for lack of subject matter jurisdiction. Pet. App. 5. The court observed that “[t]here is no question that the state court lacked subject matter jurisdiction over the claims asserted under the FTCA.” 11-cv-00582 Docket entry No. (Docket No.) 54, at 3 (Mar. 23, 2012). Because removal jurisdiction under 28 U.S.C. 1442 is derivative, the court held that it could not exercise jurisdiction over petitioners’ claims. Docket No. 54, at 3-4.

2. On August 22, 2012, about ten months after ATF notified petitioners that it had denied their administrative tort claims, petitioners filed this FTCA suit. Pet. App. 5-6. Because the suit had not been filed within six months of the administrative denial of the claims, the government moved to dismiss the suit on the ground that the claims were barred by the FTCA’s statute of limitations. *Id.* at 6. The district court held that petitioners’ claims were untimely and granted the government’s motion to dismiss. Pet. App. 39-50.

The district court rejected petitioners’ request for equitable tolling of the FTCA’s limitations bar. Pet. App. 47-50. The court observed that the Tenth Circuit had “repeatedly referred to the FTCA’s timeliness requirement as being jurisdictional,” and it accordingly concluded that “the FTCA’s limitation period is not subject to equitable tolling.” *Id.* at 48-49. The court further ruled that “if the doctrine of equitable tolling was applicable, the court would still find [petitioners’] claims time-barred.” *Id.* at 49. The court emphasized

that petitioners did not act diligently because “they were aware, from the time the case [originating in state court] was removed, that the government had taken the position that the court lacked subject matter jurisdiction over their FTCA claims.” *Ibid.* “If [petitioners] had researched the issue when it was first raised and proceeded to dismiss and then refile their claims against the United States,” the court observed, “their claims would not have been barred.” *Ibid.* The court noted as well that petitioners’ suit would have been timely if it had been filed within a month after the district court granted the government’s motion to dismiss in the first case, “but instead [they] waited * * * more than four months” to file suit. *Ibid.* Thus, the court concluded that equitable tolling would not be appropriate on the facts of this case. *Id.* at 49-50.¹

3. The court of appeals affirmed the district court’s ruling that petitioners’ suit was time-barred. Pet. App. 1-38.

Like the district court, the court of appeals held that equitable tolling was not available on two alternative bases. Pet. App. 18-37. First, the court cited prior circuit precedent stating that the FTCA’s limitations provision is jurisdictional and so cannot be tolled. *Id.* at 18-19. The court acknowledged that “significant developments in the Supreme Court’s jurisdictional jurisprudence” had cast doubt on whether that circuit precedent “accurately reflects the

¹ The district court also rejected petitioners’ reliance on equitable estoppel and relation-back principles, and further rejected petitioners’ argument that “there is no limitations period” when an “agency does not issue a decision within six months” of receiving an administrative claim. Pet. App. 43, 46-47.

current state of the law.” *Id.* at 20 (citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), and *Sebelius v. Auburn Reg’l Med. Ctr.*, 133 S. Ct. 817 (2013)). The court determined, however, that “the collective message of *Irwin* and *Auburn Regional* is [not] so indisputable and pellucid in the FTCA context that it constitutes intervening (i.e., superseding) law that would permit [the court] to hold (without en banc consideration) that [Section] 2401(b)’s limitations provisions—and, in particular, the six-month provision—are *non* jurisdictional.” *Id.* at 28. The court observed that this Court had granted a writ of certiorari to review that very question in *United States v. Wong*, No. 13-1074 (Mar. 7, 2014), and it noted that the Court would “[p]resumably * * * shed some light on the matter” when it decided that case. *Id.* at 30 n.8.

Second, the court of appeals “agree[d] with the district court that,” on the facts of this case, petitioners’ claims “would be time-barred even assuming the availability of equitable tolling.” Pet. App. 33. The court emphasized that petitioners “plainly failed to pursue their rights diligently.” *Id.* at 36. “After Lawsuit #1 was dismissed without prejudice on March 23, 2012, they had more than thirty days * * * during which they could have refiled in compliance with [Section] 2401(b),” but “[i]nstead, they did not do so for five months.” *Ibid.* Moreover, “the fact that [petitioners] had only a month in which to refile was a result of their own failure to take reasonably diligent steps,” because they knew about the jurisdictional problems with the first lawsuit when it was removed to federal court, yet they did not “voluntarily dismiss[]

their claim and refile[], thereby avoiding the entire problem.” *Id.* at 36 n.10.

In addition to finding a lack of diligence, the court of appeals concluded that no extraordinary circumstance stood in the way of a timely filing. Pet. App. 35-37. Petitioners’ misunderstanding of the law, the court explained, “amount[s] to no more than a contention of excusable neglect, and that is not good enough.” *Id.* at 35. The court further explained that petitioners’ view that no statute of limitations applied once they filed the first lawsuit “reflect[ed] a wholly unjustified and unprecedented interpretation” of the relevant FTCA provisions. *Id.* at 36. In addition, the court noted that ATF’s denial of petitioners’ administrative claim “expressly advised [petitioners] that they had six months thereafter in which to file a lawsuit in an appropriate federal court, putting [petitioners] on notice that, whatever their own understanding of the law, the *government* believed that the six-month statute of limitations began to run on October 25, 2011.” *Id.* at 36-37. Thus, the court concluded that “even if it were available to them, [petitioners] could have gained no succor from the equitable-tolling doctrine.” *Id.* at 37.²

4. About three months after the court of appeals affirmed the district court’s dismissal of petitioners’ FTCA claims, and about one month after the court of appeals denied petitioners’ petition for rehearing en

² The court of appeals also rejected petitioners’ arguments that no statute of limitations applied to their claims, that their suit was timely under relation-back principles, and that their failure to timely file could be excused based on equitable estoppel. Pet. App. 7-18, 31-33. Petitioners do not renew those arguments in this Court.

banc, see Pet. App. 51, this Court issued its decision in *United States v. Wong*, 135 S. Ct. 1625 (2015). *Wong* held that the FTCA's time limits are not jurisdictional and are subject to equitable tolling. *Id.* at 1629.

ARGUMENT

Petitioners appear to contend (Pet. 5-7) that the Court should grant their petition, vacate the judgment of the court of appeals, and remand (GVR) in light of the decision in *United States v. Wong*, 135 S. Ct. 1625 (2015). That course is not warranted here.

1. This Court has explained that “[a] GVR is appropriate when ‘intervening developments * * * reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome’ of the matter.” *Wellons v. Hall*, 558 U.S. 220, 225 (2010) (per curiam) (quoting *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam)). That standard is not satisfied in this case.

Although the Tenth Circuit's ruling that the FTCA time bar may not be equitably tolled is no longer good law in light of *Wong*, the court clearly held in the alternative that petitioners' claims “would be time-barred even assuming the availability of equitable tolling.” Pet. App. 33. Specifically, upon a thorough examination of the facts, the court held that petitioners had not pursued their claims diligently and that no extraordinary circumstance prevented a timely filing. *Id.* at 33-37. That factbound alternative holding is correct, and petitioners do not ask this Court to review it. Pet. i (question presented limited to whether

the FTCA time bar is subject to equitable tolling).³ Accordingly, there is no possibility that “a redetermination may determine the ultimate outcome” of this case. *Wellons*, 558 U.S. at 225 (citation omitted).

Moreover, although a GVR would leave the Tenth Circuit free to reinstate its prior holding that petitioners are not entitled to equitable tolling, the very issuance of a GVR would invite an unnecessary round of litigation in that court on the significance of this Court’s summary order. As this Court has explained, “if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate.” *Lawrence*, 516 U.S. at 168. Because petitioners have no basis for relitigating whether they acted diligently and whether extraordinary circumstances prevented them from timely filing suit, a GVR in this case would create no “potential benefit[]” at all, but only “delay and further cost.” *Ibid.*

2. Petitioners assert (Pet. 6) that the court of appeals “should have waited for this Court’s decision [in *Wong*] and applied it to this case.” That would have been an appropriate course. But the court’s determination that petitioners could not satisfy the standard for equitable tolling in any event meant that the proper disposition of the case did not depend on the outcome of *Wong*.

³ The petition asserts in passing in the Statement of the Case (see Pet. 5) that petitioners “are clearly entitled to equitable tolling under the facts of this case,” but the petition presents no argument on the point in the Reasons for Granting the Writ (see Pet. 5-6), and it identifies no error in the district court’s and the court of appeals’ rejection of that contention.

Petitioners maintain (Pet. 5-6) that, prior to this Court's decision in *Wong*, the Tenth Circuit "ha[d] adopted a somewhat cautious attitude towards this [Court's] case law." See Pet. i (presenting the question whether *Wong* "is binding on the Court of Appeals for the Tenth Circuit"). Since *Wong* was decided, however, the Tenth Circuit has several times acknowledged and applied this Court's holding "that the FTCA's time limits are nonjurisdictional and subject to equitable tolling." *Davis v. Secretary U.S. Dep't of the Air Force*, 601 Fed. Appx. 753 (10th Cir. 2015) (remanding for further proceedings in light of *Wong*); see, e.g., *Reid v. United States*, No. 14-6206, 2015 WL 5672624, at *1 (10th Cir. Sept. 28, 2015) (noting *Wong*'s holding "that [Section] 2401(b)'s time limits are nonjurisdictional and therefore subject to equitable tolling"); *Mark v. Northern Navajo Med. Ctr.*, No. 15-2067, 2015 WL 6899793, at *2 (10th Cir. Nov. 10, 2015) (stating that *Wong* held that "the FTCA's time limitations are not jurisdictional). Thus, the Tenth Circuit has recognized that *Wong* overruled prior circuit precedent interpreting the FTCA's time bar as a jurisdictional limit. No further review is necessary or warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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